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In the Supreme Court of the United States

OCTOBER TERM, 1979

CALIXTO AGAPITO, MARTHA CALDERON AND HORACIO RUEDA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether evidence seized pursuant to a search warrant should have been suppressed because of a prior illegal entry.

2. Whether the Fourth Amendment prohibits federal agents from listening to a conversation in an adjoining hotel room by pressing their ears against a door.

3. Whether probable cause existed to arrest petitioners.

4. Whether petitioners may challenge the legality of a search that did not intrude upon their legitimate expectations of privacy.

5. Whether comments by the trial court denied petitioners a fair trial.

6. Whether comments made by the prosecutor in his closing argument were prejudicial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17a-43a) is reported at 620 F. 2d 324. The opinion of the district court (Pet. App. 1a-16a) is reported at 477 F. Supp. 706.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1980. A petition for rehearing was denied on May 7, 1980 (Pet. App. 44a-45a). The petition for a writ of certiorari was filed on June 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846 (count I), and possession of one kilogram of cocaine with intent to distribute, in violation of 21 U.S.C. 841 (count IV). In addition, petitioner Rueda was convicted of possession of approximately six kilograms of cocaine with intent to distribute, in violation of 21 U.S.C. 841 (count II), and carrying a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c)(2) (count III). Petitioner Agapito was sentenced to concurrent terms of five years' imprisonment on counts I and IV, to be followed by concurrent three-year special parole terms. Petitioner Calderon was sentenced to a term of one year's imprisonment on count I, five years' imprisonment on count IV, suspended in favor of five years' probation, and three years of special parole. Petitioner Rueda was sentenced to concurrent terms of seven years' imprisonment on counts I, II, and IV, a consecutive term of three years' imprisonment on count III, and ten years of special parole. The court of appeals affirmed (Pet. App. 17a-43a).

The evidence adduced at trial and at a suppression hearing is set forth in the opinion of the court of appeals (Pet. App. 19a-21a). DEA Agent Victor Aponte was given information by a reliable informant concerning narcotics activity at a Manhattan hotel. The informant, who had previously given information that led to several convictions, told Agent Aponte that he had received the information from an individual referred to as Mr. X. Information provided by Mr. X in the past had proven to be reliable (Pet. App. 19a). The informant told Agent Aponte that a male and a Cuban female from Miami named Martha had been in room 1701 of the Sheraton Center Hotel for several days and were attempting to sell approximately three to four kilograms of cocaine. Mr. X had stated that he had seen and sampled the cocaine (*ibid.*).

DEA agents Forteza and Bell went to the hotel and confirmed that a Martha Calderon, with a Miami address, was registered in room 1701. The agents also discovered that she had been paying her hotel bill in cash on a daily basis. While passing the open door of room 1701, the agents observed petitioners Calderon and Agapito inside. The agents arranged to conduct surveillance from room 1702, an adjoining room. By pressing their ears to the crack between the door connecting the two rooms and its frame, the agents could hear noises and parts of conversations in room 1701 (Pet. App. 19a-20a). The next day, February 22, 1979, Agent Forteza overheard petitioner Agapito say "[h]e's bringing it over now" following a telephone conversation (*id.* at 20a). Later, petitioner Rueda was observed entering room 1701 with an attache case and a shoulder bag. After Rueda arrived, the agents heard the sounds of tape being torn and paper being shuffled and counted (*ibid.*).

Rueda and a small boy who had accompanied him left approximately 15 minutes later without the attache case

and the shoulder bag. Rueda was arrested by DEA agents in the hotel lobby, and a gun was seized from his person. He was taken to DEA headquarters and advised of his rights. He then admitted that the attache case he had delivered to room 1701 contained cocaine.[1] This information was relayed to the agents in room 1702 (Pet. App. 20a).

Petitioners Agapito and Calderon left the room later that afternoon, and petitioner Agapito was observed to be carrying the attache case that had been delivered by petitioner Rueda. They were arrested by DEA agents in the hotel lobby. The attache case was searched and found to contain $29,000 (Pet. App. 20a).

Following the arrests, the agents were admitted to room 1701 by hotel personnel. They seized a blue suitcase, but did not open it. When Ligia Atehortua, the small boy's mother, phoned the hotel room, Agent Forteza spoke to her, posing as an associate of petitioners. As a result of the conversations, agents went to Atehortua's apartment. They identified themselves and obtained Atehortua's consent to search the apartment. This search uncovered six kilograms of cocaine, $2,810 in cash, various items of narcotics paraphernalia and several pictures of petitioner Rueda (Pet. App. 21a).

On the following day, after the agents had been in the room for almost 24 hours, a search warrant was obtained authorizing the search of room 1701. The blue suitcase was then searched and found to contain approximately one kilogram of cocaine (Pet. App. 21a).

The district court denied petitioners' motion to suppress the cocaine and other evidence (Pet. App. 1a-16a). The

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[1] There was conflicting testimony as to whether petitioner Rueda subsequently retracted this statement (Pet. App. 20a).

court of appeals affirmed (*id.* at 17a-43a). The court held that the agents did not conduct an illegal search in pressing their ears against their room door (*id.* at 22a-27a). It also found that the agents had probable cause to arrest petitioners (*id.* at 27a-29a). The court ruled that petitioner Rueda had no standing to challenge the entry into room 1701 except with respect to count IV under the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960) (Pet. App. 30a-33a). It further held that the entry into the room was illegal (*id.* at 33a-35a), but that the illegality was not grounds for overturning petitioners' convictions because no evidence used in securing the convictions of petitioners Agapito and Calderon or that of petitioner Rueda on count IV was tainted by the illegality (*id.* at 36a-37a). Without the information obtained by means of the entry into the apartment, the affidavit still made a sufficient showing of probable cause to authorize issuance of the warrant that resulted in the seizure of the cocaine from the suitcase (*id.* at 37a). The court of appeals rejected petitioners' other contentions without discussion (*id.* at 38a).

ARGUMENT

1. Petitioners contend (Pet. 6-12) that the warrantless entry into the hotel room tainted the search warrant authorizing the search of the suitcase because the application for the warrant was based, in part, on information obtained from the agents' presence in the room. The court of appeals correctly rejected this contention.

Although the court below found that the entry into room 1701 was illegal because it was unnecessary to secure the premises, the cocaine seized from the suitcase was not the product of this entry. The suitcase was not searched until after the warrant was issued. And there was

sufficient evidence set out in the affidavit supporting the warrant application (Pet. App. 46a-49a), apart from that gained by the entry, to establish probable cause to issue the search warrant.[2] See *United States* v. *Giordano,* 416 U.S. 505, 555-556 (1974) (Powell, J., concurring in part and dissenting in part), and cases cited therein; *United States* v. *Marchand,* 564 F. 2d 983, 992-994 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978); *United States* v. *McHale,* 495 F. 2d 15, 17 (7th Cir. 1974). First, petitioner Rueda had explicitly stated after his arrest that he had delivered cocaine to room 1701. Second, a reliable informant had told the agent that cocaine was present in room 1701. This information was based on the personal observations of Mr. X, who had proven to be reliable in the past, and some details of the tip had been corroborated by the agents' investigation, such as the name of petitioner Calderon and the room in which she was staying. In addition, the agents had found $29,000 in cash in the attache case being carried by Agapito at the time of his arrest. Because the affidavit clearly supported issuance of the warrant without the tainted portions, the seizure of the cocaine was not a fruit of the illegal entry into the hotel room. Cf. *Wong Sun* v. *United States,* 371 U.S. 471 (1963). Rather, the evidence was legally seized pursuant to a search warrant.

2. Petitioners further contend (Pet. 12-14) that the eavesdropping by the agents with their naked ears against the connecting hotel room door violated the Fourth Amendment. This contention is without merit.

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[2] The affidavit relied in part on the fact that cocaine was found in Atehortua's apartment. Arguably, this evidence was a fruit of the illegal entry because the trip to Atehortua's apartment resulted from a telephone call answered by the agents in room 1701. See Pet. App. 36a.

The aural surveillance maintained in this case was accomplished without the assistance of any artificial device and without the commission of any physical trespass. The agents merely used their own senses from a place where they had a right to be. The court of appeals correctly concluded that petitioners had no legitimate expectation of privacy in conversations that could be overheard by persons in the adjoining room in this manner (Pet. App. 26a-27a). See *United States* v. *Jackson,* 588 F. 2d 1046, 1052-1053 (5th Cir.), cert. denied, 442 U.S. 941 (1979); *United States* v. *Fisch,* 474 F. 2d 1071, 1077 (9th Cir.), cert. denied, 412 U.S. 921 (1973); *United States* v. *Llanes,* 398 F. 2d 880, 883-884 (2d Cir. 1968), cert. denied, 393 U.S. 1032 (1969).

3. Petitioners' contention (Pet. 14) that the agents lacked probable cause to arrest them is without substance. The agents had a reliable tip, corroborated to some extent, that narcotics trafficking was underway in the room. After the agents overheard that a visitor was expected to bring something over, petitioner Rueda arrived. He was the only visitor that the agents observed in two days. When Rueda was in the room, the agents heard the counting of large sums of money. Rueda then left without the luggage with which he had arrived, indicating that he had made a delivery. These facts clearly indicated that he was involved in the narcotics activity. These facts, plus Rueda's admission that he had delivered cocaine, certainly established probable cause to arrest petitioners Agapito and Calderon. Thus, the court of appeals correctly concluded that the agents had probable cause to arrest petitioners (Pet. App. 27a-29a).

4. There is similarly no merit to petitioners' contention (Pet. 15-16) that they are entitled to challenge the legality of a search even where a legitimate expectation of privacy of theirs has not been infringed. Petitioners do not dispute

that petitioner Rueda had no legitimate expectation of privacy in the hotel room that he only visited or that no privacy interest of petitioners Agapito and Calderon was infringed by the search of Rueda's person. Rather, petitioners allege that the agents' conduct in arresting Rueda and entering room 1701 was aimed at evading the Fourth Amendment by gathering evidence against a party whose rights were not violated. There is no support whatsoever for this allegation nor any other basis here for abandoning the well-established rule that a person may not raise a Fourth Amendment objection if no legitimate expectation of privacy of his has been infringed. See generally *Rakas* v. *Illinois,* 439 U.S. 128 (1978).

5. Petitioners also contend (Pet. 17-25) that the district court's conduct during the course of the trial denied them a fair trial. This contention is without merit.

It is the district court's duty to conduct the trial in an orderly fashion and to minimize confusion and delay. See Rule 611, Fed. R. Evid.; *United States* v. *McDonald,* 576 F. 2d 1350, 1358 (9th Cir.), cert. denied, 439 U.S. 830 (1978). The district court's examination of witnesses in order to clarify confused testimony, which did not indicate partiality, was proper. See *United States* v. *Eldred,* 588 F. 2d 746, 750-751 (9th Cir. 1978). Although the court criticized defense counsel on occasion, it also criticized the prosecutor (see, *e.g.,* Tr. 999-1000). The district court's comments or criticisms of defense counsel were not prejudicial, as they were not calculated to disparage petitioners in the eyes of the jury or likely to have affected the outcome of the trial. See *United States* v. *Eldred, supra,* 588 F. 2d at 749-750. Moreover, those comments, which were directed only at petitioner Rueda's counsel and not at counsel for the other petitioners, were fully justified by counsel's unruly and disrespectful behavior (see, *e.g.,* Tr. 499).

6. Petitioners' contention (Pet. 26-29) that reversal of their convictions is required because of remarks made by the prosecutor during summation is similarly without merit. The prosecutor's remarks during rebuttal summation about hiring another chemist did not constitute a comment on petitioners' exercise of their right not to testify. Defense counsel argued strenuously that the substance found was not cocaine (Tr. 1536-1540). Accordingly, it was appropriate for the prosecutor to rebut this argument. See, *e.g.*, *United States* v. *Normile*, 587 F. 2d 784, 787-788 (5th Cir. 1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

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